No. 15,814

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Respondent*

On Petition For Enforcement of an Order of The National Labor Relations Board

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent prays that a rehearing be granted of that part of the Court's decision which declines to consider on the merits the question whether picketing to obtain the recognition of a union as the exclusive bargaining representative at a time when it does not have a majority constitutes a violation of Section 8(b)(1)(A) of the National Labor Relations Act.

1. Declination to consider the merits is based on Section 10(e) of the Act: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to

urge such objection shall be excused because of extraordinary circumstances." Neither in its statement of points (R. 139), its brief, or on oral argument did the Board suggest that Section 10(e) applied to preclude consideration of the merits of the naked question of law presented. On the contrary, the Board in its brief carefully differentiated between (1) the question of the substantiality of the evidence to support the findings of fact and (2) the question of law presented based upon acceptance of the findings. As to the findings of fact only did the Board urge that in the absence of exceptions these "are not subject to contest before this Court" (Bd. br. p. 13). Upon the question of law the Board in its brief addressed itself entirely to the merits and at no point intimated that the merits were not properly before the Court (Bd. br. pp. 15-41). Since respondent did not contest the findings of fact, and since the applicability of Section 10(e) to the question of law had not been put in issue, respondent did not treat with it. The Court thus *sua sponte* based decision on a point which, if available to the Board at all, had been waived by it. "This point was not argued by appellant, in its brief or orally, and hence is deemed abandoned." *Western Nat. Ins. Co.* v. *Le Clare,* 163 F. 2d 337, 340 (C.A. 9), and cases cited. And since Section 10(e) is not "a limitation on jurisdiction" but rather "a mandate to be observed by the reviewing court in the exercise of its admitted jurisdiction" (*Phillips* v. *S.E.C.,* 156 F. 2d 606, 608 (C.A. 2), cf. *Smith* v. *Apple,* 264 U. S. 274, 277-280), the Court is not obliged to animate an issue which has not been tendered. We suggest that as a matter of judicial administration it would seem to be at least as salutary for a court not to consider an objection not urged before it as to decline to consider the merits of a naked question of law because of the absence of exceptions before the agency.

2. The Board did not urge that the absence of exceptions foreclosed consideration of the merits of the question of law, not because of want of astuteness to make a valid

point, but because Section 10(e) has no application to this issue in the circumstances of this case. For the short of the matter is that the Board did not rely upon the lack of exceptions but considered and decided the question on its merits. The Board stated that (R. 19):

> The Trial Examiner found that by its conduct in picketing the premises of the Alloy Manufacturing Company with an object of obtaining exclusive recognition at a time when it did not represent a majority of Alloy's employees, the Respondent Union violated Section 8(b)(1)(A) of the Statute. No exceptions have been filed to this conclusion. The Trial Examiner's findings of fact, preliminary to his conclusion of law, are amply supported by the record. Moreover, his conclusion comports with our decision in Curtis Brothers, 119 NLRB No. 33. Accordingly we find, as did the Trial Examiner, that the Respondent violated Section 8(b)(1)(A) by picketing Alloy for exclusive recognition when it represented no more than a minority of employees.[2]

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2 Member Jenkins who concurred specially in the Curtis decision limited his concurrence therein to the unlawful picketing after a decertification election—which he believed to be the issue raised by the complaint in Curtis. As the complaint in the instant case is broader in that it covers all picketing for an illegal objective regardless of whether there has been an election, he therefore subscribes fully to the opinion herein.

Thus the Board did not state that it was adopting the examiner's conclusion in the absence of exceptions to it; rather it stated that it was independently finding as he did on the authority of its own contemporaneous decision in *Curtis*. Member Murdock in dissent noted that the absence of exceptions was a means of disposing of the issue without reaching the merits and remonstrated the majority for not following that course (R. 27-28):

> Inasmuch as no exceptions were filed to the Trial Examiner's findings with respect to the 8(b)(2) and 8(b)(1)(A) violation or to his failure to find an 8(b)(1)(A) violation on the basis of picketing for a union shop, I see no reason to pass upon these issues. How-

> ever, as the majority's 8(b)(1)(A) findings are based upon the theory of coercion adopted in the Curtis case, that peaceful picketing for recognition by a union constitutes coercion under Section 8(b)(1)(A), I do not agree with the rationale of the findings.

And, while the Board denied the request for oral argument in this case (R. 18, n. 1), the Board heard oral argument in *Curtis* and in *Shepherd Machinery Co.*, 19 NLRB No. 39, 41 LRRM 1065, simultaneously (Bd. br. p. 49, n. 1, 61, n. 11), and it issued its decision in *Shepherd* and in this case on the same day, giving this case the earlier number and disposing of an issue in *Shepherd* by citation of this case (41 LRRM 1065, n. 2).

It is thus patent that the Board deliberately disregarded the absence of exceptions and instead chose to utilize this case and *Curtis* as its vehicles for the full expression of its pioneer interpretation of Section 8(b)(1)(A). It is not unusual for the Board to consider the merits of a matter although no exceptions are directed to it. Under its rules, although it need not, it may consider a particular issue to which no exception is taken if the case is before it on any exceptions.[1] It not infrequently does so.[2] It did so here designedly and with full foreknowledge.

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[1] Section 102.48(a) of the Board's rules provides that:

> In the event *no* statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order *shall* be adopted by the Board and become its findings, conclusions, and order, and *all* objections and exceptions thereto *shall be deemed waived* for *all* purposes [emphasis supplied].

On the other hand Section 102.48(b) provides that:

> Upon the filing of a statement of exceptions and briefs, as provided in section 102.46, the Board *may* decide the matter forthwith upon the record, or after oral argument, or *may* reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or *may* close the case upon compliance with recommendations of

In these circumstances there is no room for the application of Section 10(e). Section 10(e) expresses "the salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field and Co.* v. *N.L.R.B.,* 318 U.S. 253, 256; *N.L.R.B.* v. *Cheney California Lumber Co.,* 327 U.S. 385, 389. When the Board, despite the absence of exceptions, does consider on the merits the question thereafter urged on review, the reason for the rule disappears. The Board can claim neither that it was deprived of an administrative "opportunity for correction" (*United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33, 37), nor that it was not "put . . . on notice of the issue now presented" (*May Department Stores Co.* v. *N.L.R.B.,* 326 U.S. 376, 386, n. 5).

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the intermediate report, *or may make other disposition of the case* [emphasis supplied].

Section 101.12(a) of the Board's Statements of Procedure explains in part that:

> If *any* party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, *reviews the entire record,* including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. * * * It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner [emphasis supplied].

On the other hand Section 101.12(b) explains that:

> If *no* exceptions are filed to the intermediate report, and the respondent does not comply with its recommendations, the Board adopts the report and recommendations of the trial examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes [emphasis supplied].

[2] *E.g., International Brotherhood of Teamsters, Local 179,* 110 NLRB 287, 288; *Utah Construction Co.,* 95 NLRB 196, 211, n. 38; *General Shoe Corp.,* 90 NLRB 1330, 1333, n. 12; *International Rice Milling Co. Inc.,* 84 NLRB 360 (wherein the Board dismissed a complaint although no exceptions were taken to the examiner's findings of violations and the only exceptions taken were by proponents of the complaint who contended that the examiner had not gone far enough. For a further history of this case see, 183 F. 2d 21 (C.A. 5), reversed in part, 341 U. S. 665).

The Board deliberately sought out the issue and considered its merits as fully as it would have had specific exception been taken. To apply Section 10(e) nonetheless would be an anachronistic exaltation of form. Accordingly, as the Court of Appeals for the Second Circuit said of Section 24(a) of the Public Utility Holding Company Act,[3] a provision like Section 10(e), "It seems not inappropriate for us to consider the lack of objection here as excused because of the Commission's own actions in examining the issue involved and to decide the case upon the merits. . . ." *Phillips* v. *S.E.C.*, 156 F. 2d 606, 608. And as the Court of Appeals for the District of Columbia Circuit has similarly stated, "Section 19(b) of the Natural Gas Act limits our consideration to those points which have been urged before the Commission in an application for rehearing. The plain purpose of that provision of the statute is to give the Commission an opportunity to rule upon any matter which is to be relied upon on review. The Commission is thus placed in the position of framing the issues we shall hear. By waiving a procedural irregularity and deciding the underlying substantive issue, the Commission places that substantive issue before us for review." *City of Pittsburgh* v. *F.P.C.*, 237 F. 2d 741, 749. So here, by disregarding the absence of exceptions and deciding the underlying substantive issue, the Board places that substantive issue before the Court for review. The Board does not contend otherwise.

3. There is an inherent limitation upon the applicability of Section 10(e) which is pertinent here. The absence of objection does not foreclose judicial inquiry to determine whether the Board has "traveled outside the orbit of its authority. . . ." *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388. The obligation of judicial oversight to this extent has been recognized by this Court even where

[3] "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure to do so."

no exceptions to the examiner's report have been filed by any party to the proceeding. *N.L.R.B.* v. *Red Spot Electric Co.*, 191 F. 2d 697. As Judge Pope stated in his concurring opinion in that case, "upon a petition of this kind we should carefully examine the record for the purpose of determining that the Board had jurisdiction to make its order and that it has not 'traveled outside the orbit of its authority.' Such procedure is in conformity with the ancient practice of courts of equity when asked to enter a default decree." *Id.* at 699-700.

The issue in this case is squarely within this reservation. It presents the naked question of law whether the Board acts in excess of its statutory authority when it requires the cessation of picketing to secure the recognition of a union which does not have majority status. To the solution of this question agency expertness does not contribute. Even if it did, the Board has expressed its full thoughts on the subject. And this is not the distinct situation where the power of the agency to lay its hand upon the subject is admitted and the only question is whether the circumstances exist which renders exertion of the power permissible. If respondent is correct in its view of the reach of Section 8(b)(1)(A) the decree would prohibit it from engaging in conduct which is allowable to all others under the law of the land.

4. Section 10(e) is not so exigent as to require or permit this Court *sua sponte* to decline to reach the merits of a naked question of law which the Board did affirmatively consider and decide and which goes to the Board's statutory authority. As the Supreme Court stated in *Hormel* v. *Helvering,* 312 U.S. 552, in holding that a Court of Appeals "should have given and properly did give consideration" to a point not presented to or considered by the Board of Tax Appeals (*id.* at 559), as ingrained a part of the rule that "Ordinarily an appellate court does not give consideration to issues not raised below" (*id.* at 556) is the qualification "that such appellate practice should not be

applied where the obvious result would be a plain miscarriage of justice'' (*id.* at 558). To heed the qualification is not to disrespect the rule (*id.* at 557):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The *Hormel* teaching is particularly pertinent here. For here the Board *did* consider and decide the merits of the issue which the Court is asked to review, here the issue pertains to ''agency action taken in excess of delegated powers'' (*Leedom* v. *Kyne,* 3 L. ed. 210, 215), and here no objection has been interposed to judicial review of the merits of the issue. To read Section 10(e) as nevertheless precluding judicial review is to disregard its purpose and the tradition of appellate practice of which it is a part.

Wherefore this petition for rehearing should be granted and the Court should proceed to consider the merits of the question whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits picketing by a union to secure its recognition as the exclusive representative at a time when it does not have a majority.

Respectfully submitted,

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February 1959.

Certificate of Counsel

I certify that this petition for rehearing is not interposed for delay and in my judgment it is well founded.

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February 1959.